TCEQ DOCKET NO. 2013-1488-SLG

IN THE MATTER OF THE APPLICATION	§	BEFORE THE
OF GORDON CLIFFORD SWENSON FOR	§	TEXAS COMMISSION ON
TCEQ REGISTRATION NO. 710926	§	ENVIRONMENTAL QUALITY

REPLY TO RESPONSES TO MOTIONS TO OVERTURN EXECUTIVE DIRECTOR'S DECISION

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COME NOW, James D. Story and Amy Story, Jim L. Story and Joanne Story, (Story Ranch Ltd.), Los Senderos Ranch, Ltd. (Steen Family, Colina Ventosa Ltd), Eddie Moore, Cal Taylor, Evergreen Underground Water Conservation District, City of Nixon and George and Maria Blanch, and file their Reply to Responses to Motions to Overturn the Executive Director's Decision.

Stormwater Runoff:

There is real concern about stormwater runoff carrying pollutants, associated with domestic septage from this proposed land application site, into the waters of this state, in violation of the rules and regulations of the TCEQ. There is nothing in the application or the registration for this project that indicates that such runoff will not occur. In fact, the TCEQ acknowledged in its Response to Comments that such runoff is inevitable. Thus, the amount of domestic septage that is to be applied on this site is critical to minimizing any potential impacts that may occur when such runoff flows off-site and into the waters of this state.

The TCEQ rules specify a maximum annual application rate based on the nutrient uptake of the particular crop to be grown on the land application site. This rate equated to about 77,000 gallons per acre for the entire year, based on the amount of nutrients that this type of crop would be able to absorb over an entire year. This annual rate averages out to about 422 gallons per acre over a 48-hour period (or about 9 gallons per acre per hour). The TCEQ has stated that this

application rate is set so as to ensure "that nutrients are fully utilized by plants and none are available for seepage into groundwater or surface water bodies." Yet, the maximum application rate allowed under the Registration is 6,800 gallons per acre per 48 hours (or about 142 gallons per acre per hour). This is about 16 times greater than the rate at which the crop can absorb the nutrients; thus, the nutrients will not be fully utilized by plants so that none are available for seepage into the groundwater or into surface waters.

In the ED's Response to the Motion to Overturn, the ED states that the purpose of this 48-hour application rate is not intended to meet a nitrogen application requirement, but rather to prevent runoff. However, there is nothing in the record that shows how the ED determined that this 48-hour application rate will prevent runoff from the site. Furthermore, the ED has stated in its Response that "the domestic septage needs to be applied as it arrives at the site." If this is true, then what restrictions are there as to how much can arrive at the site and be applied on an hourly basis so as to ensure that there will be no runoff from the site. The only limitation put on the applicant in the Registration is a 48-hour maximum application rate, not an hourly application rate. The applicant could apply all 6,800 gallons per acre that are allowed in far less time than 48 hours, thus exceeding the rate that the ED determined was needed to prevent runoff. Runoff into waters of the state is a violation of the prohibition against discharge without a permit. See Texas Water Code § 26.011.

Soils Composition:

This particular site is made up of primarily clayey soils, according to the Soils Report contained in the record. Per that Report, such soils have a low permeability, meaning that they do not quickly absorb water, and instead allow surface water to more quickly run off. This Report also states that "clayey or wet soils are poorly suited to use as septic tank absorption

fields." This is due to the poor absorption rate of these types of soils. This is why there is serious concern about runoff leaving this particular site during rain events, or even during application of the domestic septage. In spite of this soils data, the Applicant in its Response to the Motion to Overturn makes the ridiculous argument that the "applied material infiltrates immediately due to the extremely low application rate." The application rate being referred to by the Applicant is the 48-hour rate, not any rate that may actually occur as the domestic septage is arriving at the site that must be applied immediately. Based on this 48-hour rate of 6,800 gallons per acre, the absorption rate of these soils to prevent runoff would be on the order of 0.005 inches per acre per hour. This sounds reasonable given the type of soils involved (i.e. clayey). Yet there is no restriction on the application of septage at this site so as to limit the rate to 0.005 inches per acre per hour in order to prevent runoff of this domestic septage from this site. The OPIC Response to the Motion to Overturn raises the same concern, "whether the 48 hour limit is low enough to ensure that the land application will be conducted in a manner that prevents runoff and is protective of water quality."

Groundwater Table:

As for the lack of information regarding the soils data in the Application, particularly as it relates to depth to groundwater, there is no information provided in the record as to the "seasonal high" groundwater table as is required in the regulations. Instead, the Applicant and the ED in their Responses state that the Soils Report dated Dec. 4, 2012 provides the necessary information. However, that report only gives an estimate of the depth to groundwater, but does not discuss or present any information on the "seasonal high" groundwater table, as is required by the regulations. The groundwater table may generally be low for much of the year, but have seasonal highs during rainy portions of the year. Given that this domestic septage will be applied

throughout the year, it is important that the ED have information on the "seasonal high" groundwater table, not just the normal or average depth to groundwater, as is provided in the Soils Report. Again, the OPIC Response indicates a similar concern about the lack of sufficient information for the ED to make an informed decision about this application and whether it will be protective of the groundwater and surface water in the area.

FEMA Map:

The FEMA floodplain map fails to show the extent of the floodplain of the tributary of Elm Creek as the creek crosses the site. The FEMA map clearly shows that the study that was conducted on that stream, to determine the extent and elevation of the floodplain, stopped downstream of and short of where the stream crosses the site. Thus, there is no way to determine, based on the FEMA map, if the floodplain of that stream, as it passes through the site, extends beyond the buffer zone and into the proposed application area of the site. The ED seems to not understand this concept in its Response, while the Applicant attempts to use the floodplain elevation of 320 feet above mean sea level to conclude that the floodplain does not extend beyond the buffer zone within the site. However, this 320 feet elevation is taken from the FEMA studied area, which is located downstream of the site. The actual floodplain elevation of the stream at this site must be higher than is the floodplain elevation of this stream further downstream, as water flows downhill.

Oil and Gas Lease:

Applicant admits that there is an oil and gas lease covering the property in question but states that the lease does not impact the registration the Registration in any way. Response of Gordon Clifford Swenson to Motion to Overturn, 8. (Response) He argues that if a new water well is drilled in the property, "then the Commission authorization . . . requires the Applicant to

provide an additional buffer zone around the new water well." Response 8–9. The Texas Administrative Code and TCEQ's "Instruction and Application to Register a Site for Beneficial Land Application of Domestic Septage" require that an applicant delineate the boundaries of the application area and all buffer zones, including a 200 foot buffer zone from surface water and 200 foot buffer zone from any sinkholes or other conduits to groundwater. *See* 30 TAC § 312.44(c). But it is unclear how, if and when drilling or frack pits take place on the land pursuant to the oil and gas lease, the Applicant will provide "an additional buffer zone" after domestic septage has already been applied to the application area. In other words, if septage is applied to the area described in the application and then drilling occurs, it will be too late to provide the required buffer zone of 200 feet and water contamination may occur.

The threat of groundwater contamination is real if drilling is permitted after septage has been applied to the land application site. The Story protestants request that either the application site area is amended to provide for buffer zones in anticipation of oil and gas drilling or that oil and gas drilling is prohibited altogether on the site after septage has been applied. If these requests are denied, the protestants seek clarification about how these conduits to surface water and/or groundwater will be protected in the event that drilling occurs pursuant to the existing oil and gas lease on the land. We have sent separately a copy of the oil, gas and mineral lease that demonstrates that the lessee has the right to make "surveys…, establish and utilize facilities for surface and subsurface disposal of salt water, construct roads and bridges, dig canals, build tanks, power stations, telephone lines, employee houses, and other structures on said land…". Domestic septage application appears incompatible with these activities.

Land Ownership:

In the Motion to Overturn, the Story protestants argued that the Applicant owned three additional parcels of land that were not identified in the application. Further review of this issue indicated that, although the Applicant does own three additional parcels of land in the vicinity of the proposed site, they do not appear to be contiguous to the site. However, the Applicant owns or controls a right-of-way that runs adjacent to the proposed site and continues to the three additional properties. It is unclear whether this right-of-way makes the three additional properties "on-site".

CONCLUSION

Based on the comments contained in the Motion to Overturn, and the comments contained in the Reply, Story protestants respectfully request that the Executive Director's decision be overturned on the issues of stormwater runoff including application rate, soils composition, groundwater table, FEMA map, oil and gas lease and land ownership as well as the incorrect TX Dot Map, all to assess whether sufficient information has been provided to protect the surrounding properties, surface water and groundwater and the environment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 23rd day of September, 2013, the undersigned hereby certifies that a true and correct copy of the foregoing instrument was served on all attorneys/parties of record as indicated below.

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